IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b))

Description of case

No. WP 96/03 (MS)of 200 . decided on 26/9/2003

Naresh Chandra Gautam

Vs.

Chhote Khan

A.F.R. (Approved for reporting)

~~**Not approved for reporting**~~

Date

26/9/2003 **Initials of Judge**

Note- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 96 of 2003 (M/S)

Naresh Chandra Gautam
S/o Devki Nandan
R/o Avas – Vikas Colony
Kashipur
District Udham Singh Nagar …….. Petitioner

Versus

Chhote Khan
S/o Natthu
R/o Bazpur Road
Kashipur
District Udham Singh
Nagar …..... Respondents

Dated:26.09.2003

Hon'ble Rajesh Tandon J.

By the present writ petition under Article 226 of the Constitution of India the petitioner has challenged the order passed by the Additional Civil Judge/F.T.C., Kashipur, district Udham Singh Nagar dated 14.11.2002 by which the petitioner has prayed that issue No.5 may be decided as a preliminary issue. The learned Additional Civil Judge has rejected the application and has safeguarded the interest of the petitioner that issue No.5 shall be decided alongwith other issues. The present petition has been filed against the aforesaid order.

Heard Sri Nand Prasad Advocate for the petitioner as well as Sri Dharamvir Advocate for the respondent at great length.

The petitioner has submitted that both the petitioner and the respondent live in the town of Kashipur, district Udham Singh Nagar where there are shops and residence in the Avas Vikas Colony,

Kashipur, There is a road between the shop of the petitioner and the respondent. It was alleged that the shop of the petitioner exists to the south of the road whereas the shop of the respondent is situate towards North of the said road. The petitioner, therefore, has brought a suit No.148 of 1990 with the prayer that the doors, windows, shutter, ventilator exists on the ground floor of the petitioner's building be closed by a decree of mandatory injunction. It was stated by the petitioner that the said suit No.148 of 1990 was dismissed on24.12.1994. According to the plaint averments the respondents have again filed Civil Suit No.243 of 1996 for injunction in the same court of Munsif with the prayer that the petitioner be restrained from using the aforesaid road and the door, windows, shutter, ventilator on the ground floor of the petitioner's building may be closed by a decree of mandatory injunction.

After filing the written statement by the petitioner an issue was framed being issue No.5 to the effect that the suit is barred by the principles of res-judicata. The court below has passed the order that the issue shall be decided alongwith other issues in the suit itself

I have perused the plaint of suit No.148 of 1990 as well as the plaint of suit No. 243 of 1996.

The decision of issue No.5 depends upon the question of law as well as fact and, therefore, the trial court has rightly pointed out that it is not a case where issue No.5 may be decided as a preliminary issue and the same shall be decided alongwith the other issues.

Order XIV rule 2 CPC provides that where the court is of opinion that the case or any part thereof may be disposed of on any issue of law only, it may try that issue first. The bar has been created to try the suit on preliminary issue only when there arises a jurisdiction of the court or a bar to the suit created by any law for the time being in force. Order XIV rule 2 CPC is quoted below:

Court to pronounce judgment on all issues-

(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the

provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is opinion that the case of any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on the issue.

As appear sub-rule (2) of order XIV that the court shall pronounce judgment on all issues except (a) and (b).

In the present case the finding of the learned Judge shows that without examining the evidence and the facts of the case it will not be possible to decide the suit on the question of law only.

The question of res-judicata being mixed question of law and facts and is not a pure question of law and therefore it can not be decided as a preliminary issue. In Major S.S. Khanna Vs Brig. H.J.A.I.R. 1964 Apex Court has held as under:

"Under O. 14 R 2. Code of civil Procedure, where issues both of law and of fact arise in the same suit, and the Court is of Opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the court: not to do so,

especially when the decision on issues even of law depends upon the decision of issues of fact, would result in a top-sided trial of the suit'.

However, as rightly pointed out by the court below that it involves question of fact and law both, therefore, the jurisdiction under Order 14 rule 1 CPC can not exercised at the preliminary stage.

Further as will appear from the facts on the record that substantial justice has been done between the parties as the Civil Judge, (S.D.) has already observed that the said issue shall be decided alonwith other issues, therefore there is no error of jurisdiction in the exercise of the powers by the Civil Judge (S.D.) and, as such, the writ petition fails and is liable to be dismissed. However the Court below is directed to expedite the Suit and decide the same within a period of six months from the date of the filing of the certified copy of the order passed by this court.

For the aforementioned reasons, I find no infirmity in the order passed by the Court below so as to invoke the jurisdiction under Article 227 of the Constitution of India.

Consequently, the writ petition is dismissed. However there will be no order as to costs.

Dated: 26.09.2003

(Rajesh Tandon., J.)